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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 673

H. B. NELSON CONSTRUCTION COMPANY,
Petitioner,

vs.

THE UNITED STATES.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS AND BRIEF IN SUPPORT THEREOF.

S. WALLACE DEMPSEY,
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Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 673

H. B. NELSON CONSTRUCTION COMPANY,
Petitioner,

vs.

THE UNITED STATES.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

The petitioner, H. B. Nelson Construction Company, prays that a writ of certiorari issue to review the judgment of the Court of Claims in the above entitled case.

Opinion Below.

The opinion of the Court of Claims is not yet officially reported (R. 22-24).

Jurisdiction.

The judgment of the Court of Claims was entered June 3, 1940. A motion for a new trial was overruled on October 7, 1940 (R. 24, 25). The jurisdiction of this Court is invoked under Section 3(b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939.

Questions Presented.

1. Did the court below have jurisdiction to dismiss the petition upon findings for which there is no basis?

2. Was the court's failure and refusal to make special findings of fact requested by petitioner, which are facts upon vital questions and indispensable elements in the case, a violation of this Court's Rule 41?

3. Are the findings of the court below sufficient to sustain judgment for respondent in view of the undisputed facts set out below?

4. Did the court below err in assessing liquidated damages against petitioner?

5. Is petitioner entitled to judgment for the amount asked by him upon the undisputed evidence in the case?

Statement.

Facts Not Disputed.

Harry B. Nelson is an individual, trading under the name of H. B. Nelson Construction Co., named as petitioner herein.

On the 12th of September, 1934, Harry B. Nelson entered into a contract with the United States, numbered NOy-2248, whereby, for the consideration of $275,889.00, he agreed to furnish all labor and materials, and perform all work required for constructing an intermediate and high frequency transmitter building, a low frequency transmitter building, a barracks, a helix house, a pump house, a water tower, two cooling ponds, a settling tank, certain roads and walks, and water, sewerage, drainage and electrical systems, at the Naval Radio Station, Summit, Canal Zone, in accordance with designated drawings and specifications, the work to be commenced within 10 calendar days after date of receipt of

notice to proceed, the buildings and services to be completed within 300 calendar days and all the remaining work within 330 calendar days from the date of receipt of notice to proceed (R. 11, 12).

Notice to proceed with the work was received by the contractor September 26, 1934, thus fixing the final date for completion of the buildings and services July 23, 1935, and of the remaining work August 22, 1935 (R. 12).

The Chief of the Bureau of Yards & Docks, Navy Department, was the contracting officer for the United States (Id.).

Petitioner's bid was based upon the contract, specifications and plans which designated the type of buildings, their locations and all the data necessary to enable the contractor to purchase the materials he needed, and to lay out in advance the course he intended to follow in order to obtain the best and most economical time for starting one class of work following another, and the necessity for providing proper materials in required amounts at the proper times (Plf's. Ex. 101). In preparation for performance the contractor entered into various contracts with suppliers of materials in the United States (R. 12).

Petitioner started erecting the buildings shortly after the notice to proceed was received on September 26, 1934. From November 1934, respondent began making changes, some of which are,—

Petitioner was required to relocate the High and Intermediate Frequency, the Low Frequency and Helix Buildings, with their respective roads and services; change the details of construction in the Helix House; change the interior and exterior details of the Low Frequency Building; provide additional windows and conduit connections at the High and Intermediate Frequency Buildings; omit 3 transformers and provide four laundry tubs in lieu of a scrub deck; provide non-ferrous concrete aggregates for the coil variometer foundations in the Helix and Low Fre-

quency Buildings; provide and install additional ground busses and pipes and three antenna eyes with anchors; complete the road connection at the main station entrance; provide structural steel (instead of wood) (Change Order A; Ct's Find. No. 10; R. 17), supports in the roof trusses of the Helix House for the changed location of the antenna eyes; provide ducts for the parkway lighting cable; provide 50 pairs telephone cables in lieu of the 5 pairs; provide concrete trenches for transformer connections as shown in lieu of steel conduit as planned at the High Frequency Building, and install a duct for electrical connection to the cooling pond motor; provide additional trenches and make changes in others called for in Low Frequency Building (Change Order B; Court's Find. No. 10; R. 18).

Petitioner was required by respondent after buildings were started to tear out and remove parts of the buildings, and change the locations. Petitioner was required to take his men off of work when respondent ordered him not to do it that day, because of an order to change it over to another position. This caused a lot of chaotic conditions on the job; petitioner's men were not satisfied because they did not know what to do. The constant changing of orders upset the order of things. Respondent's plans were not properly prepared, as the buildings were not built as originally laid out. There were changes from day to day. This caused longer time to do the work aside from what petitioner was paid for in the changes s t in the paragraph above (R. 29).

Respondent, in making the changes set out in its Change Orders A and B, would consider the actual time only as to what they would take in time to do the actual work, and did not take into account at all the delay in the job as a whole, in changing from one form of completion to another form of completion (R. 29).

The effect of the changes summarized in Plf's. Ex. 106-A,

Change Order A (R. 17), consisting of about 50 changes (R. 28), covering a period from November 1934 to May 1935, was that it left petitioner with a very unsettled organization, as he did not know what to do next, because respondent would change its mind on what it decided the day before, and the workmen were lost, as they didn't know what respondent wanted to do. That demoralized the workmen because there was so much inconsistency as to the plans and specifications, and was apparently experimental work (R. 30, 31).

These changes brought out a building of a peculiar construction and nature. Respondent would find from time to time that the building would not meet its needs, so it would make changes in relocating them, and in the types of construction (R. 29).

Change Order B is the result of various changes made between May and July 27, 1935, providing additional changes of various kinds and natures in the various buildings, with 15 or 20 individual changes involved in that recapitulation of the changes (R. 29, 18).

From the start of the job, petitioner was given a work order to go ahead, and in a few days given a change order to stop, and then in a few days he was given another change, and that kept on repeating itself for many months, which not only interfered with the purchase of materials, but necessarily increased the costs by reason of the unsettled conditions (R. 30).

The contract provided that changes in excess of $500 must be by a written order (Plf's. Ex. 101, p. 3). The written order for the first changes, Change Order A, was not made until May 8, 1935 (R. 17). Previous to this time petitioner was not required under the contract to make the changes, but he did work though without a full force (R. 31), although he maintained several hundred men on the job (R. 26).

In the high and low frequency buildings there were 50 window frames and contact rolls, and 100 screens to be installed (R. 37). The screens and frames were made by the Truscon Steel Co. (R. 36) according to the drawings with the specifications (Plf's. Ex. 101, Spect. p. 5), and were inspected by the Government inspectors in the United States and approved as required by Section 15-01 of the specifications (Court's Finding No. 3; R. 13). The window frames and contact rolls and screens were installed in the building, and approved by the Government officials (R. 36, 37). Later, a new inspector required petitioner to remove the frames and contact rolls, notch six points on each of the rolls (R. 36), and rebuild (R. 25) and replace them (R. 36). Petitioner had to burn the tops of the metal frames off with an acetylene torch and re-weld the additional members to the frames, which required employing a concern which had burning and welding equipment (R. 25, 31). The specifications did not require the notching (R. 37). Said extra work took 30 days, and cost $1700, which has not been paid (R. 25, 26).

The contract, p. 4 (d), Plf's. Ex. 101, provides:

> "Inspection of material and finished articles to be incorporated in the work at the site shall be made at the place of production, manufacture, or shipment, whenever the quantity justifies it, unless otherwise stated in the specifications; and such inspection and acceptance, unless otherwise stated in the specifications, shall be final, except as regards latent defects, * * *."

The specifications provided that the ceiling was to be put up with bolts (Specifications, Plf's. Ex. 101, Spec. p. 5, R. 38).

On October 25th and 30th, 1934, respondent changed the method of putting up the ceiling, and directed soldering (R. 32; Plf's. Ex. 105-C). November 1, 1934, petitioner replied

that it was almost impossible to solder as respondent directed, but he figured on soldering by the sweat process (Plf's. Ex. 105; R. 34).

The work was not started until after July 24, 1935 (R. 38), and, before starting, petitioner advised respondent that it was impossible to solder by sweating, but respondent ordered him to try (Plf's. Ex. 105-D; R. 39).

After repeated attempts to solder by the sweat method, respondent's officer in charge notified the Bureau in Washington, D. C., that the contractor could not solder by the sweat process, and requested information whether to leave the bolts as he had them on the 12-foot centers (R. 35).

Respondent still insisted on soldering, which petitioner, over his protest, was forced to try again (Plf's. Ex. 105-E; R. 35).

After repeated and unsuccessful attempts to solder, respondent, on November 16, 1935, directed that all solder be omitted, and that bolts be used, *just as the specifications provided* (R. 26, 38, 16).

The officer in charge reported that petitioner had made earnest efforts to sweat the strips on (R. 35, 39, 16).

After the copper ceiling was completed as ordered with bolts, petitioner was ordered to remove the copper ceiling and put in additional bolts (R. 26). Due to respondent's arbitrary orders, changes, errors and demands, petitioner was delayed over 33 days on the Helix House, and put to extra expenses of $1920 for which he was not paid (R. 26), but, was erroneously charged with liquidated damages for the delay (Plf's. Ex. 107). The construction of this ceiling involved unusual questions (R. 29, 38).

The contract required, and the officer in charge arbitrarily and through bad engineering ordered that a ten ton roller be used after the road bed was constructed and crushed rock was on it (R. 16, 27; Plf's. Ex. 101, Spec. p. 15).

The roller was far too heavy, and seriously damaged the work done, and resulted in petitioner being forced to rebuild parts of said road. It would bury the rock into the mud, resulting in a loss and replacement of about one-third of the rock in the bed of the road. It caused the road to curl up in front of the roller and necessitated a great deal of re-rolling, cross rolling and hand tamping, and resulted in 30 days of extra work. The extra rock cost over $4000, and the extra rental for a roller was over $1500, making together $5500, which has not been paid, and which petitioner is entitled to recover (R. 27).

Respondent failed within a reasonable time to inspect and approve certain lavatories (Plf's. Exs. 104-A to W). It rejected them July 19, 1935, but later and not till September 30th it approved them as first submitted (Plf's. Ex. 106-M; Deft's. Ex. in Court's Finding No. 12; R. 20), making a delay of 65 days. This delay increased the costs as it was necessary to hold experienced mechanics on the job until they arrived, which was after the contract completion date. These workmen had work which had to be done after the lavatories were in place (R. 31; Plf's. Ex. 106-M).

Respondent had petitioner put in additional trenches and cover plates for trenches. This work in the low frequency building caused a delay of 2 or 3 days as the plates had to be made (Plf's. Ex. 106-N; R. 26).

Respondent's failure to approve the pumps from Oct. 21 to Nov. 2, 1935, caused a delay of 12 days, during which time petitioner had to keep experienced men on the job for the test (Plf's. Ex. 106-E). The extra expense of the pump men was $75.00 per week (R. 28). Petitioner duly protested this delay (Plf's. Ex. 106-E, 106-H).

Respondent received samples of the putty September 19th, but did not release it for shipment until October 2nd (R. 14), a delay of 13 days.

As a result of the arbitrary and unnecessary delays and mistakes made by respondent, and of the extra work caused thereby, petitioner was unable to complete the work within the time specified by the contract, and was necessarily engaged in completing it extra time (R. 25-31), as follows, (a) the low and high frequency buildings, 36 days; (b) the Helix House, 33 days; (c) the Barracks, 57 days; and (d) the other structures—the roads and the remaining work—2 days, all of which is in addition to the extra time allowed by respondent (Plf's. Ex. 107). Petitioner would have completed the contract within the time specified in the contract and made a reasonable profit of 10% except for the delays caused by respondent (R. 28).

Respondent, on making petitioner his final payment, erroneously and illegally deducted $2490 as liquidated damages, which petitioner duly protested (Deft's. Ex. AA; R. 30).

Petitioner protested repeatedly during the progress of the work to respondent that the contract price, and that arbitrarily fixed for extra work required by respondent's changes, mistakes, delays, and the time for doing the contract work with the extra work were all of them inadequate (R. 30; Plf's. Exs. 105D and E, 106-C-D-E-F-G-J-L-N; 104-M-R-U-W).

No action had been taken in regard to the above protests when the release was made (R. 30).

Petitioner was obliged to accept said terms imposed by respondent and the payment tendered because he had to have payments for the additional work and for work specified in the contract, to enable him to meet his payroll (R. 30) of several hundred men (R. 26), and other expenses, and the respondent arbitrarily refused to make any payments made unless petitioner accepted them in full (R. 30), as expressed by Commander Fogg "no change order, no money". Petitioner had exhausted his own means through

the multitude of changes and consequent delays and greatly increased costs (Plf's. Exs. 102, 103; R. 28, 29).

The additional price named in the change orders and paid covered only the cost of work and material made necessary by those changes, and included nothing for the additional and extra costs caused by and directly resulting from the change order delays and from the day to day minor changes made throughout the approximately 400 day period the work lasted, for which petitioner was in no wise responsible (R. 29).

The necessary costs of the construction work as shown by petitioner's checks and vouchers (Plf's. Exs. 102, 103) was $322,030.40. Ten per cent profit on the cost would amount to $32,203.04, and one and one-half per cent for the bond would have amounted to $5,313.50. The contract price plus what respondent allowed for extras amounted to $287,842.71, leaving the total amount now due petitioner $71,704.19 (R. 28).

Specification of Errors to be Urged.

Petitioner urges that the Court of Claims erred in failing and refusing to find the following Findings of Fact requested by petitioner, viz.:

I.

(1) The construction of the radio buildings, as the high and low transmitter buildings, and the helix house, was substantially and practically changed as to the whole work to be done, as shown by the many changes in the change orders made from the time the work commenced (R. 17, 18).

(2) From the start of the job petitioner was required to make many changes from day to day in addition to the 65 changes made in change orders A and B (R. 29). This created an unsettled condition, and increased costs and

delays (R. 28-31). Petitioner had to remove parts of buildings and change their locations, resulting in the buildings not being built as provided for in the contract (R. 28, 29). Although the contract provided that no change in excess of $500 was to be made until there was a written order, which was not made until May 8, 1935, respondent required petitioner to make various changes before the written order was received to prevent additional delays as much as possible (R. 31).

Virtually, petitioner could do nothing when notified of a change to be made until the change order of May 8th was received. However, he did work, but was prevented at times from working a full force, although he maintained several hundred men on the job (R. 30, 31, 26).

(3) The Government buildings, by the constant day by day changes from the specifications, were actually constructed as *experimental*, new kind of buildings of a particular construction (R. 29). Petitioner did not know what to do next, as respondent's officials would change their minds on what they decided the day before. Such inconsistency was demoralizing to the workmen (R. 28, 29), took extra time in changing from one form of completion to another, and made extra expenses (R. 28, 29).

(4) Respondent failed within a reasonable time to inspect and approve certain lavatories (Plf's. Exs. 104-A to W). It rejected them July 19, 1935, but later and not till September 30th it approved them as first submitted (Plf's. Ex. 106-M; Deft's. Ex. page 10 of Court's Finding No. 12; R. 20), making a delay of 65 days. This delay increased the costs as it was necessary to hold experienced mechanics on the job until they arrived, which was after the contract completion date. These workmen had work which had to be done after the lavatories were in place (R. 31; Plf's. Ex. 106-M).

(5) Respondent had petitioner put in additional trenches, and cover plates for trenches. This work in the low frequency building caused a delay of 2 or 3 days as the plates had to be made (Plf's. Ex. 106-N; R. 26).

(6) In the high and low frequency buildings there were 50 window frames and contact rolls, and 100 screens to be installed (R. 37). The screens and frames were made by the Truscon Steel Co. (R. 36) according to the drawings with the specifications (Plf's. Ex. 101, Spect. p. 5), and were inspected by the Government inspectors in the United States and approved as required by Section 15-01 of the specifications (Court's Finding No. 3; R. 13). The window frames and contact rolls and screens were installed in the building, and approved by the Government officials (R. 36, 37). Later, a new inspector required petitioner to remove the frames and contact rolls, notch six points on each of the rolls (R. 36), and rebuild (R. 25) and replace them (R. 36). Petitioner had to burn the tops of the metal frames off with an acetylene torch, and re-weld the additional members to the frames, which required employing a concern which had burning and welding equipment (R. 25, 31). The specifications did not require the notching (R. 37). Said extra work took 30 days, and cost $1700, which has not been paid (R. 25, 26).

The contract, p. 4 (d), Plf's. Ex. 101, provides:

> "Inspection of material and finished articles to be incorporated in the work at the site shall be made at the place of production, manufacture, or shipment, whenever the quantity justifies it, unless otherwise stated in the specifications; and such inspection and acceptance, unless otherwise stated in the specifications, shall be final, except as regards latent defects, * * *." (Plf's. Ex. 101).

(7) The specifications provided that the ceiling was to be put up with bolts (Specifications; Plf's. Ex. 101, p. 5, R. 38).

On October 25th and 30th, 1934, respondent changed the method of putting up the ceiling, and directed soldering (R. 32; Plf's. Ex. 105-C). November 1, 1934, petitioner replied that it was almost impossible to solder as respondent directed, but he figured on soldering by the sweat process (Deft's. Ex. HH; R. 34).

The work was not started until after July 24, 1935 (R. 38), and, before starting, petitioner advised respondent that it was impossible to solder by sweating, but respondent ordered him to try (Plf's. Ex. 105-D; R. 39).

After repeated attempts to solder by the sweat method, respondent's officer in charge notified the Bureau in Washington, D. C., that the contractor could not solder by the sweat process, and requested information whether to leave the bolts as he had them on the 12-foot centers (R. 35).

Respondent still insisted on soldering, which petitioner, over his protest, was forced to try again (Plf's. Ex. 105-E; R. 35).

After repeated and unsuccessful attempts to solder, respondent, on November 16, 1935, directed that all solder be omitted, and that bolts be used, *just as the specifications provided* (R. 26, 38, 16).

The officer in charge reported that petitioner had made earnest efforts to sweat the strips on (R. 35, 39, 16).

After the copper ceiling was completed as ordered with bolts, petitioner was ordered to remove the copper ceiling and put in additional bolts (R. 26). Due to respondent's arbitrary orders, changes, errors and demands, petitioner was delayed over 33 days on the Helix House, and put to extra expenses of $1920 for which he was not paid (R. 26), but, was erroneously charged with liquidated damages for the delay (Plf's. Ex. 107). The construction of this ceiling involved unusual questions (R. 29, 38).

(8) The contract required, and the officer in charge arbitrarily and through bad engineering ordered that a ten ton

roller be used after the road bed was constructed and crushed rock was on it (R. 16, 27; Plf's. Ex. 101, Spec. p. 15). The roller was far too heavy, and seriously damaged the work done, and resulted in petitioner being forced to rebuild parts of said road. It would bury the rock into the mud, resulting in a loss and replacement of about one-third of the rock in the bed of the road. It caused the road to curl up in front of the roller and necessitated a great deal of rerolling, cross rolling and hand tamping, and resulted in 30 days of extra work. The extra rock cost over $4000, and the extra rental for a roller was over $1500, making together $5500, which has not been paid, and which petitioner is entitled to recover (R. 27).

(9) Respondent's failure to approve the pumps from Oct. 21 to Nov. 2, 1935, caused a delay of 12 days, during which time petitioner had to keep experienced men on the job for the test (Plf's. Ex. 106-E). The extra expense of the pump men was $75.00 per week (R. 28). Petitioner duly protested this delay (Plf's. Ex. 106-E, 106-H).

(10) Respondent received samples of the putty September 19th, but did not release it for shipment until October 2nd, R. 14),—a delay of 13 days.

(11) As a result of the arbitrary and unnecessary delays, and mistakes made by respondent, and of the extra work caused thereby, petitioner was unable to complete the work within the time specified by the contract, and was necessarily engaged in completing it extra time (R. 25-31) as follows; (a) the low and high frequency buildings, 36 days; (b) the Helix House, 33 days; (c) the Barracks, 57 days; and (d) the other structures,—the roads and the remaining work, —2 days, all of which is in addition to the extra time allowed by respondent (Plf's. Ex. 107). Petitioner would have completed the contract within the time specified in the contract

and made a reasonable profit of 10% except for the delays caused by respondent (R. 28).

(12) Respondent, on making petitioner his final payment, erroneously and illegally deducted $2490 as liquidated damages, which petitioner duly protested (R. 30; Deft's. Ex. AA).

(13) Petitioner protested repeatedly during the progress of the work to respondent that the contract price, and that arbitrarily fixed for extra work required by respondent's changes, mistakes, delays, and the time for doing the contract work with the extra work were all of them inadequate (R. 30; Plf's. Exs. 105D and E, 106-C-D-E-F-G-J-L-N; 104-M-R-U-W).

No action had been taken in regard to the above protests when the release was made (R. 30).

Petitioner's letter of Sept. 16, 1935, (Plf's. Ex. 106-C), to the Commandant, 15th Naval District, as to the delay caused by respondent's failure to inspect and ship the glass, putty and plumbing material was not answered until Feb. 7, 1936, almost 2 months after the release was executed.

Petitioner's letter of Oct. 16, 1935 (Plf's. Ex. 105-D), to the District Public Works Office protesting the extra work required by respondent's officer, and requesting extra pay, was not answered.

Petitioner's letter of Oct. 21 (Plf's. Ex. 105-E) to District Public Works Officer again protesting about the copper work in the Helix House, stating that although it was completed Oct. 10, 1935, respondent's officer had ordered the copper changed which would require additional work and time, was not answered.

Petitioner's letter of October 21, 1935 (Plf's. Ex. 106-E), protesting the delay caused by failure to furnish a portable power plant was not answered until Feb. 7, 1936.

(14) Petitioner was obliged to accept said terms imposed by respondent, and the payment tendered because he had to have payments for the additional work, and for work specified in the contract, to enable him to meet his payroll (R. 30) of several hundred men (R. 26), and other expenses, and the respondent arbitrarily refused to make any payments made unless petitioner accepted them in full (R. 30), as expressed by Commander Fogg 'no change order, no money.'' Petitioner had exhausted his own means through the multitude of changes and consequent delays and greatly increased costs (Plf's. Exs. 102, 103; R. 27, 28).

(15) The additional price named in the change orders and paid covered only the cost of work and material made necessary by those changes, and included nothing for the additional and extra costs caused by and directly resulting from the change order delays and from the day to day minor changes made throughout the approximately 400 day period the work lasted, for which petitioner was in no wise responsible (R. 29).

(16) The necessary costs of the construction work as shown by petitioner's checks and vouchers (Plf's. Exs. 102, 103), was $322,030.40. Ten per cent profit on the cost would amount to $32,203.04, and one and one-half per cent for the bond would have amounted to $5,313.50. The contract price plus what respondent allowed for extras amounted to $287,842.71, leaving the total amount now due petitioner $71,704.19 (R. 28).

II.

The court erred in making the following Special Findings of Fact:

(1) ''The work that plaintiff did on the screens was necessary in order to make them conform to the specifications, and the fitting of the screen to its window was

a hand-fitting job that could only be performed at the site." (Finding 3; R. 13).

(2) "There was no delay on the part of the Government in inspection and release for shipment of the * * * putty to the site of the work." (Finding 4; R. 14).

(3) "On September 27, 1935, the manufacturer informed the inspector that the lavatories were ready for inspection."

"They were received * * * without delaying the completion of those buildings."

"There was no delay on the part of the Government in inspection of the lavatories." (Finding 5; R. 15).

(4) Finding 7, except Section 8-01 of the Specifications (R. 15, 16).

(5) "There is no proof that the contractor was required to do more than provided for by his contract." (as to the road and roller). (Finding 8; R. 16).

(6) "The contractor was ready to make the test" (for the pumps) "in the latter part of October, 1935." (Finding 9; R. 17).

III.

The Court of Claims erred in making the following Conclusions of Law:

Upon the foregoing special findings of fact, which are made a part of the judgment herein, the court decides, as a conclusion of law, that the plaintiff is not entitled to recover and its petition is therefore dismissed (R. 22).

Judgment is rendered against the plaintiff for the cost of printing the record herein, the amount thereof to be entered by the clerk and collected by him according to law (R. 22).

IV.

The Court of Claims erred in making the following Findings in its Opinion:

"The facts show that all these changes which were made were provided for in the contract, and that plain-

tiff accepted the Change Orders, performed the work, received the compensation as fixed in the Change Orders and that the time for completion of the contract was extended by the allowance of additional days. In addition to this, plaintiff's release to defendant of all claims is a complete defense to any action for recovery under the contract except as to the items which had been specifically excepted in the release." (R. 23).

"The evidence discloses that inspection was made within a reasonable time and, if there were any delays, plaintiff contributed to them by its failure to give the proper information to the manufacturer from whom the glass and putty had been purchased by it." (R. 23).

"It is also contended that the Government delayed plaintiff in not properly inspecting the plumbing fixtures, but the facts show that the completion of the buildings was not delayed because of a slight delay in inspection." (R. 23).

"The inspection in the United States was purely one of materials. The contract required that the screens should fit the windows in such a way as to prevent insects from entering the building but after the arrival of the screens it was found that certain adjustments had to be made in order to make them bugproof. It was part of the contract that plaintiff should perform this work. We can find no variance from the specifications in requiring plaintiff to fit the screens to the windows. (R. 24).

"There are other allegations of delay on the part of the Government in reference to road-building and furnishing electricity, and the covering of the ceiling of the helix house with copper sheeting, which we do not think it necessary to discuss at length. (*Id.*).

"The facts in the case show that the Government complied strictly with the terms of the contract and that plaintiff was not delayed by any act of the Government for which it was not allowed an extension of time and an increase in the contract price. (*Id.*).

"The delays for which plaintiff has had liquidated damages assessed against it were caused by its own

failure to comply with the terms of the contract. (*Id.*).

"Plaintiff's petition is dismissed. It is so ordered." (*Id.*).

Reasons for Granting the Writ.

(1) The Court of Claims failed and refused to make petitioner's requested Special Findings of Fact which are upon vital questions and are indispensable elements in the case, and not in dispute, in disregard of Rule 41 of the United States Supreme Court. The requested Special Findings of Fact are set out under Point I in the Specification of Errors to be urged, and are sufficient to entitle petitioner to judgment under the authorities of this Court, and all other authorities, as follows:

(a) Respondent made 50 major change order changes, each involving over $500—one every third day for five months of the performance of the work—and 15 to 20 major changes from May to July 27th—one every fourth day—and it made additional minor changes from day to day throughout the 400 days the work was in progress, whereby the work was so substantially and materially departed from as to amount to a constructive abandonment of its terms and specifications, and advance planning of the work was made impossible; chaotic conditions resulted and the order of doing the work was upset; delays were caused by changing from one form of completion to another; petitioner's men became demoralized and dissatisfied, and petitioner was obliged to wait for change orders, and was thereby made unable to work a full force, although he had several hundred men on the job, and the changes bothered, too, on the purchase of materials, and coordination of men and materials was made impossible and the constant changes broke the morale of petitioner's force, as more particularly shown under subdivisions (1) to (3) inclusive of Point I of the Specifications of Errors, all of which delays and changes

resulted in a large increased cost, the total cost being $322,030.40, on which there has been paid $287,842.71, leaving unpaid thereon $71,704.19, for which sum petitioner is entitled to judgment (R. 28), and the refusal of the court to grant such judgment was erroneous and in conflict with the decisions of this Court and of the prior decisions of the court below. (*U. S.* v. *Behan,* 110 U. S. 338; *U. S.* v. *Spearin,* 248 U. S. 132; *U. S.* v. *Barlow,* 184 U. S. 123, 135, 136, 137; *Rust Engineering Co.* v. *U. S.,* 86 Ct. Cls. 461; *Phoenix Bridge Co.* v. *U. S.,* 85 Ct. Cls. 603; *Kellog Bridge Co.* v. *U. S.,* 15 Ct. Cls. 206; *Sobel* v. *U. S.,* 88 Ct. Cls. 149, 165; *Montrose Contracting Co.* v. *Westchester County,* 94 F. (2d) 580, 584; *U. S.* v. *Esnault-Pelterie,* 299 U. S. 201; *Henderson Bridge Co.* v. *McGrath,* 134 U. S. 260; 9 C. J. § 55, p. 722; Industrial Housing by Knowles, p. 34; Waste in Industry, p. 72).

(b) Because the Court below refused to recognize the approval by the Government inspectors in the United States of the window frames, screens, and contact rolls in the high and low frequency buildings as final, although the alleged defect was a visible and not a latent one, and refused to find that petitioner was entitled to an extension of time and compensation because respondent required petitioner to burn off the metal joining the screens and certain contact rolls, and to make six notches in each roll, and to rebuild the screens, which was not required by the contract, taking 30 days extra time and costing $1700, which has not been paid, as fully described in subdivision (6) of No. I of the Specifications of Errors, which rulings of the Court are in conflict with the contract and with the decisions of this Court, and the previous decisions of the Court below, which hold that petitioner was bound to do only what the specifications required, and respondent is liable for the cost of additional

work necessary to complete the job. (*Hollerback* v. *U. S.*, 233 U. S. 165; *Christie* v. *U. S.*, 237 U. S. 234; *U. S.* v. *Utah N. & C. Stage Co.*, 199 U. S. 414; *U. S.* v. *Spearin*, 248 U. S. 132; *Rust Engineering Co.* v. *U. S.*, 86 Ct. Cls. 475; *Sobel* v. *U. S.*, 88 Ct. Cls. 149).

(c) Because the Court below found contrary to the fact that the contractor has been paid for installing the ceiling in the Helix House on the basis of the sweating process by receipt of $1671, whereas this payment was determined on in advance of the work, and was to cover a change from 14-ounce to 45-ounce copper, and in changing wood for steel supports, and the additional work resulting therefrom (far the greater part of the anticipated work and expense), as well as what was expected to be the small difference between bolting and soldering, and because the Court erroneously found that the soldering process was not satisfactory, in face of and contrary to its own finding that the first effort was unsatisfactory, and on the next the same trouble was experienced, and contrary also to the finding of respondent's officer in charge that the ceiling could not be put up by the sweating process despite petitioner's earnest efforts, and despite the abandonment of this process by respondent (R. 34); and because the Court refused to find the fact that after the ceiling was completed with bolts as directed, respondent required petitioner to remove it and put in additional bolts; and because the Court refused to find that petitioner was delayed 33 days on this work, and paid about $1920 extra expense or that he was entitled to recover therefor and was erroneously charged with liquidated damages for delay, as fully described in subdivision (7) of Point I of the Specification of Errors, and contrary to the proof and to the decisions of this Court and of the Court below, under the decisions cited above.

(d) Because the Court below erroneously refused to hold (R. 16) that petitioner is entitled to recover a loss of $5500 and the value of 30 days of extra work, and of the delay to the work as a whole, which he suffered through respondent's requiring him to use too heavy a roller to roll the surface of a road even which he had constructed in accordance with respondent's specifications, and finished except for such rolling, (Specification of Error No. 8, Point I), despite said Court having found and held that the road curled up before said roller, and that it crushed rock into the mud so that petitioner had to use more rock after and because of such use, and that the roller was somewhat lighter than the specifications as to the weight of the roller provided, from which said Court erroneously concluded and held that the specification was binding, and that petitioner was obliged to furnish whatever extra stone was made necessary through its use, and to rebuild the torn up road (No. 8), instead of holding, as required by the decisions of this Court, that the specification of the weight of the roller to be used (No. 8) was a warranty that such a roller would be of the proper weight, and that petitioner was not required to rebuild a road completed as required, but torn up afterwards by too heavy a roller, which respondent required him to use, and that he was entitled to judgment for the $4000 paid out for extra rock, and $1500 for extra rental of a roller, besides the value of thirty extra days of work made necessary, and the loss through the resulting delay to the work as a whole, (Specification of Error No. 8, Point I). This finding, and refusal to find, is in conflict with the provisions of the specifications, and the decisions of this Court, and the Court of Claims under the decisions cited above.

(e) The Court below refused to find the ultimate facts that respondent caused certain delays shown under Point

I, subdivisions 4, 5, 9 and 10 of the Specification of Errors, as to inspecting lavatories, making extra trench plates, and inspecting the pumps, and putty, in conflict with the decisions of this Court cited in *U. S.* v. *Esnault-Pelterie,* 299 U. S. 201.

(f) It is undisputed that there were many changes made both under change orders (R. 17, 18) and from day to day by respondent, as shown under Point I of the Specification of Errors, causing constant delays in the progress of the work, yet the Court below refused to find that petitioner was not liable for liquidated damages, which is in conflict with the decisions of this Court and the Court below. (*U. S.* v. *United Eng. Co.,* 234 U. S. 236; *Standard Steel Co.* v. *U. S.,* 67 Ct. Cls. 445; *Greenfield Tap & Die Corp.* v. *U. S.,* 68 Ct. Cls. 61; *Christensen Constr. Co.* v. *U. S.,* 72 Ct. Cls. 500; *Bethlehem Steel Co.* v. *U. S.,* 75 Ct. Cls. 845).

(2) The Court of Claims erred in making the Special Findings of Fact set out under Point II of the Specification of Errors, all of which are plainly without support in the evidence. These findings are in conflict with the decisions of this Court in *General Talk. Pictures Corp.* v. *Western El. Co.,* 304 U. S. 175, 178.

Conclusion.

The Findings of the Court of Claims set out in Point II of the Specifications of Errors to be urged, are not the ultimate facts. Such facts are set out as errors for failure to find under Point I. As respondent put in issue all the allegations of the complaint by its general traverse, the findings in order to be sufficient to sustain judgment must specifically decide all the questions, which are mainly:

(a) Did the 65 major changes—one every third day for five months, and one every fourth day for the rest of the

time the work was in progress—and minor changes from day to day and the delays necessarily resulting therefrom, (making it impossible to plan in advance, and demoralizing the men, and making it impossible for petitioner, with hundreds of men employed, to work a full force while waiting for change orders, as he frequently had to do, as described in detail in Point I, subdivision (b) of the Specification of Errors), amount to an abandonment of the contract, entitling petitioner to recover on a *quantum meruit*?

(b) The Court found that certain screens were inspected and approved by the respondent's inspectors in the United States, but that the local inspector required them to be materially altered (R. 13). The alleged defect was a space of 3/8 of an inch between the window and screen, and was visible. The contract, page 4, provided that the approval after inspection in the United States was final, except as to latent defects (Plf's. Ex. 101, p. 4). The two ultimate questions remain which the Court below failed to decide—was there such a provision in the contract, and was it binding, entitling petitioner to recover the value of the extra work?

(c) Respondent required petitioner to experiment with a method of putting up the ceiling in the Helix House, different from the specifications, which, after many earnest efforts by petitioner, proved impossible, and was abandoned by respondent, and after the ceiling had been put up with bolts, as respondent directed it, required him to tear it down, and put it up again in a different way. While, as found, petitioner was made an allowance in advance for soldering the ceiling when both parties supposed this to be practicable, he was not paid for the repeated attempts after it proved impracticable which respondent required, or for tearing down the ceiling when put up as ordered, and putting it up again. The ultimate questions remain whether

petitioner is entitled to recover what he has not been paid for the experimental work and for tearing down the ceiling after installed as required, and putting it up again.

(d) Respondent required petitioner to use too heavy a roller in rolling a road constructed and completed, except for such rolling in accordance with the specifications, resulting in tearing up the road, and a $4000 loss paid for extra rock, and $1500 for a roller for extra time. The Court below (it appears by inference), held that the specifications prescribed the weight of the roller and are binding. The ultimate question is—did specifying the weight of the roller amount to a warranty that it would be proper for the work, and as it proved far too heavy, is petitioner entitled to recover his loss of $5500 expended for rock and roller rental, plus the value of the extra work made necessary?

(e) Was petitioner released from paying liquidated damages on account of the extended delays resulting from the multitude of changes?

(f) What was the necessary cost expended by petitioner? What amount is petitioner entitled to recover?

The Court of Claims is also required but failed to include circumstantial facts sufficient to warrant its conclusion in respect to the main issues.

The failure to find such ultimate and circumstantial facts in respect to the main issues is in conflict with Rule 41 of this Court, and *U. S.* v. *Esnault-Pelterie,* 299 U. S. 201.

The failure of the lower Court to make specific findings upon the main issues entitles petitioner to a writ of certiorari, as this Court may now, under the Act approved May 22, 1939, amending subsection b of section 3 of the Act of February 13, 1925 (43 Stat. 936, 939, c. 229; U. S. Code, Title 28, Sec. 288b), examine, analyze, and compare the circumstantial facts found, with the evidence brought up, to

ascertain whether as matter of law petitioner is entitled to judgment.

For the reasons stated, it is respectfully submitted that this petition for writ of certiorari should be granted.

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BRIEF IN SUPPORT OF PETITION.

Opinion Below.

The opinion of the Court of Claims is not yet officially reported (R. 22-24).

Jurisdiction.

The judgment of the Court of Claims was entered June 3, 1940. A motion for a new trial was overruled on October 7, 1940 (R. 24, 25). The jurisdiction of this Court is invoked under Section 3(b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939.

Questions Presented, Specification of Errors to be Urged, and Statement of the Case.

A statement of the questions presented, specification of errors to be urged, and a statement of the case will be found in the foregoing petition.

ARGUMENT.

I.

While the court below found that numerous major changes from the contract and specifications were made in the construction of the buildings, it refused to find that other very numerous changes were made, or the effect upon the progress of the work or the delays caused thereby, or the loss resultant therefrom, although all of these requested findings were based on undisputed evidence, and the facts found, together with the facts requested, constitute overwhelming proof that the contract was abandoned, and that petitioner is entitled to judgment for the unpaid part of the costs which he was compelled to incur.

(1) The court below made the following Findings as to Change Orders A and B made by respondent, viz,

That change order A was issued May 8, 1935 (R. 17) for the following changes in the work:

> "(a) Relocate the High and Intermediate Frequency, and Low Frequency and Helix Buildings, with their respective roads and services * * *; change the details of construction in the Helix House * * *; change interior and exterior details of the Low Frequency Building * * *; provide additional windows and conduit connections at the High and Intermediate Frequency Building * * *; omit three transformers and provide four laundry tubs in lieu of a scrub deck, * * * at the Barracks Building; and
>
> "(b) Provide non-ferrous concrete aggregates for the coil and variometer foundations in the Helix and Low Frequency Buildings; provide and install additional ground busses and pipes and three antenna eyes with anchors * * *; and complete the road connection at the main station entrance * * *; All as directed by the officer in charge."

(The order fixed the price for this change order work at $10,905.72, and fixed the time for doing it at 60 days—the time being estimated) (R. 17).

That Change Order B was made July 27, 1935, for the following changes (R. 18):

> "(a) Provide structural steel supports in the roof trusses of the Helix House for the changed location of the antenna eyes;
>
> (b) Provide ducts for the parkway lighting cable under future roads as directed;
>
> (c) Provide a 50 pair telephone cable in lieu of the 5 pair necessary and omit the installation on same;
>
> (d) Provide concrete trenches for transformer connections as shown in lieu of steel conduit as planned at the High Frequency Building, and install a duct for electrical connection to the cooling pond motor; and

(e) Provide additional trenches and make changes in others called for in the Low Frequency Building floor;

All as directed by the officer in charge."

(The order fixed the price for this change order work at $3,204.28, and the time for doing it 5 days—the time being estimated (R. 18; Plf's. Ex. 106-B).

(2) The court below refused to find the following undisputed facts as to the Change Orders—(R. 17, 18).

That the two change orders embraced 65 major changes (R. 28, 29); that as the contract provided that no change in excess of $500 (Plf's. Ex. 101, p. 3) was to be made until there was a written order, petitioner could do virtually nothing when notified of a change to be made until the change order was received, and was thus prevented at times from working a full force, when he had several hundred men on the job (R. 31, 26; Specification Error No. 2—hereinafter designated as S. E.).

(3) The court below refused to find the following additional, undisputed facts as to changes—

From the start of the job, petitioner was required to make many changes from day to day in addition to the 65 changes covered by the two Change Orders (R. 29); that the changes resulted in the buildings not being constructed as provided for in the contract (R. 28; S. E. 2); that by the constant day by day changes the buildings were actually constructed as experimental, new kind of buildings of a particular construction (R. 29; S. E. 3).

(4) The court below refused to find the following facts, based on undisputed evidence, as to the effect of the changes on the progress of the work, the time it took and the added expense—

Petitioner did not know what to do next, as respondent's officials changed their minds on what they decided the day

before, and such inconsistency was demoralizing to the workmen, took extra time in changing from one form of completion to another, and made extra expense (R. 28, 29; S. E. 3); as a result of respondent's delays and mistakes, and of the extra work caused thereby, petitioner was unable to complete the work within the time provided and it was necessary to take the time actually taken (R. 25-31); S. E. 11), in addition to extensions for the time taken in making the change order changes; nothing was allowed for the day to day changes or for the consequential delays resulting from both kinds of changes (Plf's. Ex. 107; R. 29; S. E. 15); petitioner would have completed the work within the time limited, and have made a 10 per cent profit except for respondent's delays (R. 28; S. E. 11).

(5) The disastrous effect upon the progress of the work caused by the multitude of change orders and by the day to day changes as shown above is further illustrated by the following undisputed evidence, viz,—

> "* * * when you are starting * * * it is very discouraging to have to tear out and remove parts of the buildings and change the locations, take the men off of the work and say, 'Here, we can't do this today; we have got an order to change it over to another position'. * * * we can't keep the men satisfied * * *. That just upsets the order of things, that is just a constant changing of orders; and it just shows they are not prepared—they * * * did not build them in the way they were originally laid out." (R. 28, 29).
>
> "It was apparently experimental kind of work." (R. 29).
>
> "They would find, from time to time, that it did not meet their needs." (R. 29).
>
> "From the start of the job, we were given a work order to go ahead, and in a few days we were given a change order to stop and then in a few days more we

would be given another change * * *, and that kept on repeating itself for many months; * * * and the costs necessarily were increased by reason of that unsettled condition * * *. So that meant we had to try to keep our materials and our men coordinated. It was almost impossible to do that, * * * and just broke our morale." (R. 30, 31).

"The written order for the first changes was made May 8th and I received these letters of criticism in February. I couldn't go ahead with the work. One man can write me a letter criticising the slow progress of the work, and another man can write me letters and give me authorization to make changes, and I don't know which one to follow." (R. 31).

(6) Because of the 65 major changes,—one every third day from November 1934 to May 1935, and one every fourth day from May to July 27th, 1935,—and minor changes from day to day for the 400 days the work was being done, resulting in an abandonment of the contract,—petitioner became entitled to recover his added expenditures, plus a reasonable profit, amounting together to $71,704.19 (R. 28):

(a) The Government had no right to compel petitioner, as it did, to make experimental changes, and when found unsuited to its needs to again change, from day to day, and thus improperly interfere with petitioner's work, to his loss. (*U. S.* v. *Barlow,* 184 U. S. 123, 135 to 138 incl., and cases cited at 137).

(b) The authorities on construction of buildings accentuate the principle that to complete them in a reasonable time, or at a reasonable cost, all the details must be planned in advance, but constant changes, as made here, prohibit using advance plans, and entail delays and added expense. (Clark, Architect, Owner & Builder, p. 291; Waste in Industry, p. 72; Eliminating Waste, 8th Nat'l. Housing Conference, pp. 253, 254; Knowles Industrial Housing, p. 34).

(c) The courts, and the authorities on building concur in holding that where there are a multitude of such changes, as made here, the case should be regarded as one of general employment, with an implied obligation by the owner to pay what the work and materials are reasonably worth.

(Same authorities as last cited, and

U. S. v. *Behan,* 110 U. S. 338;
U. S. v. *Spearin,* 248 U. S. 132;
U. S. v. *Barlow,* 184 U. S. 123, 135, 137 incl.;
Sartoris v. *Utah Const. Co.* 21 F. (2d) ps. 1, 3;
Mass. Bonding & Inc. Co. v. *John R. Thompson,* 88 F. (2d) 580, 583, 584;
Montrose Contracting Co. v. *Westchester County,* 94 F. (2d) 580, 583, 584;
Sobel v. *U. S.* 88 Ct. Cls. 149, 165;
Rust Engineering Co. v. *U. S.* 86 Ct. Cls. 461;
Phoenix Bridge Co. v. *U. S.* 85 Ct. Cls. 603; 9 C. J. §55, p. 722;
Emden's Building Contracts, Etc., 4th Ed. Ch. XIV, p. 190; Salt Lake City v. *Smith,* 104 Fed. 457, 458;
Bates & Roger Const. Co. v. *Board of Comrs. of Cuyahoga County, Ohio,* 274 F. 659;
Henderson Bridge Co. v. *McGrath,* 134 U. S. 260).

(d) The refusal of the Court below to find that day to day changes were made, and to find that the effect of the very numerous change orders and from day to day changes was an abandonment of the contract, and to find that petitioner was entitled to recover on a *quantum meruit* his added cost, was in conflict with Rule 41 of this Court,—all of the facts described being ultimate and material facts. (*U. S.* v. *Esnault-Pelterie,* 299 U. S. 201).

(e) Respondent failed to offer any proof that petitioner's expenses were extravagant or unnecessary, and he is en-

titled, under those circumstances, to recover his entire cost, plus a profit, amounting to $71,704.19. (*U. S.* v. *Behan, supra*).

II.

The court below erroneously refused to find that petitioner suffered losses in each of the three items of construction below described (all of which are items of the general losses described under Point I above), although the evidence that petitioner suffered these losses through respondent's delays and unwarranted superintendence is clear, and as to all material matters undisputed, contrary to the provisions of Rule 41 of this Court.

Details as to how ill petitioner has fared are as follows:

(a) Respondent required petitioner to use so heavy a roller on a road completed according to the specifications, except for rolling, that it tore up the road and required refinishing at an extra cost of $5500. for rock and roller rental, taking 30 days extra time (R. 27). The Court below held that respondent was not liable because the weight of the roller was fixed by the specifications (R. 16), whereas this was a guarantee that such a roller would be proper. (*U. S.* v. *Spearin*, 248 U. S. 132).

(b) Certain windows and screens were approved by respondent's inspectors (R. 13). Their approval was final except as against latent defects (Plf's. Ex. 101, p. 4). Respondent required petitioner to have the metal welding of screens and contact rolls together burned off in order to drill notches in the roll, and the rolls and screens rewelded together, and rebuilt (R. 25, 31, 36). The defect, if any, was visible, not latent (R. 36), and notching was not required by the specifications (R. 37). So, the notching was extra work, which cost $1700., and took 30 days time (R. 25, 26). The Court below held respondent not liable because (1) the job

was a hand-fitting one (R. 13), whereas every bit of the work was done and had to be done with a big heavy machine (R. 25, 31); (2) because the job had to be done at the site (R. 13), whereas, (if done at all), it should have been done at the factory before the rolls and screens were welded together, thus saving the burning off and rewelding (R. 25, 31); and (3) because the inspection was purely of materials (R. 24, Opinion), whereas, it included "finished products" (Plf's. Ex. 101, p. 4). Petitioner is entitled to recover the value of the extra work and time (*Henderson Bridge Co.* v. *McGrath,* 134 U. S. 260).

(c) Respondent required petitioner to make 5 experimental efforts to put up a ceiling,—4 by soldering (R. 34; Plf's. Ex. 105-E), 1 by combination of soldering and bolting (R. 16), (the first 4 of which proved failures, and the fifth unsatisfactory) (R. 26), and the sixth by bolting twice the number of bolts without solder as the specifications originally provided (R. 26). The Court below held respondent not liable because proof that the sweating process was impracticable was not satisfactory (R. 16), (on the basis of incompetent evidence that a ceiling had been put up by soldering at Pearl Harbor). This finding is directly contrary to the Court's own detailed previous finding as to soldering, showing that it was impossible and stating its conclusion that both alone and combined with bolts, soldering efforts were unsatisfactory (R. 16), and proof by respondent's expert, that petitioner was unable to obtain tight joints by the sweat process (R. 35); that both methods of sweating, alone and by using bolts with it, failed (R. 38, 39), and that petitioner made serious efforts to sweat the strips on (R. 39). Petitioner was delayed 33 days and put to an extra expense of $1920, by this experimental work, and, therefore, is entitled to recover his loss (*U. S.* v. *Barlow,* 184, U. S. 123, 135, 137).

III.

The court below erred in refusing to make undisputed requested findings the respondent delayed inspecting and releasing for shipment lavatories, putty, and pumps, and in ordering extra cover plates (S. E. 4, 5, and 10).

(a) Lavatories rejected July 19, 1935, were not approved as first submitted until September 30th, making a delay of 65 days (S. E. 4; R. 20; Plf's. Ex. 106-M); (b) putty was ready for inspection September 19, 1935, but was not released for shipment until October 2, 1935, a delay of over 12 days (S. E. 10; R. 14); (c) extra trench plates caused a delay of 2 or 3 days (S. E. 5; R. 26; Plf's. Ex. N); (d) pumps were ready for inspection October 12, 1935, but were not inspected or accepted until after November 2, 1935, a delay of over 12 days (S. E. 9; R. 27, 28; Plf's. Ex. 106-E, 106-H); (e) urinals and other plumbing supplies inspected in July were not released for shipment until October 2, 1935, a delay of over 60 days, which delayed the tile contractor (Plf's. Ex. 104-M; Plf's. Ex. 104-S-U; Plf's. Ex. 104-V).

IV.

The court erroneously refused to find that petitioner is entitled to judgment for the $71,704.19, which he claims (S. E. Point I-16), despite the release.

The release is not binding because:

(a) It was signed when a payment was due, which petitioner could not get except by signing it. He had to have the money for his payroll (R. 30). He had no other means of meeting it. He had $34,187.69 tied up in the work (R. 28). Respondent knew that petitioner's means had been

exhausted, and that he had been obliged to secure advances from his surety. (Plf's. Ex. 103).

Hazelhurst Oil Mill Co. v. *U. S.*, 70 Ct. Cls. 335; *Ingram* v. *Lewis*, 37 F. (2d) 259; cases quoted 70 A. L. R. 711; 84 A. L. R. 296 to 298 incl., and 64 A. L. R. 121, 122; *Hanson* v. *Fowler*, Fed. Cas. No. 6042, Vol. II, p. 469, 471; *Dunbar* v. *U. S.*, 65 Ct. Cls. 567).

(b) The payment was only of what respondent admitted due on the contract and change orders. Nothing was paid or intended by respondent to be paid for the damages outside the contract. The release should be confined to what respondent intended to pay and not be extended to the damages. It is immaterial that petitioner did not except the damages, as he had protested repeatedly previously, with no results.

(*Fire Ins. Co.* v. *Wickham*, 141 U. S. 564; *Piatt's Admr.* v. *U. S.*, 89 U. S. 496; *Atlantic Greyhound Lines* v. *Metz*, 70 F. (2d) 166; *Alexander Kiskadden, Admr.* v. *U. S.*, 44 Ct. Cls. 205; *Nelson* v. *Chicago Mill Etc. Co.*, 76 F. (2d) 17, 24; *Plato* v. *U. S.*, 86 Ct. Cls. 665, 678; *Pneumatic Gun Carriage & Power Co.* v. *U. S.*, 36 Ct. Cls. 71; *Sanborn* v. *U. S.*, 46 Ct. Cls. 254; *Sheridan-Kirk Contract Co.* v. *U. S.*, 53 Ct. Cls. 82; 3 Williston on Contracts (Revsd. Ed.) § 619, ps. 1784, 1785; 4 Page on Contracts, §§ 2451, 2452, ps. 4343, 4344).

(c) The release was given pursuant to a contract provision, which is not susceptible of a construction barring this action (Plf's. Ex. 101, p. 6), which provides that the release shall be of all claims under and by virtue of this contract, other than such claims as may be specifically excepted by the contractor. (Id.)

(1) The object of this provision to insure a contractor the right to assert disputed claims for damages should be given effect. (*Woolworth Co.* v. *Peterson*, 78 F. (2d) 47; *Phoenix Bridge Co.* v. *U. S.*, 85 Ct. Cls. 603, 630).

(2) The effect of petitioner's failure to except is to be determined by consideration of the release in connection with the contract provision as to it (R. 18; Plf's. Ex. 101, p. 6). Holding that this failure defeats the claim would be unjust and unreasonable; that it forfeits the claim; and would be in conflict with the purpose of the contract provision. For these reasons, such holdings should not be made (*Knowlton* v. *Moore*, 168 U. S. 41, 77; *U. S.* v. *Botany W. Mills*, 98 F. (2d) 880, 883; Page on Contracts, Supplement § 2039, ps. 1394, 1395), particularly as the obvious object of the provision as to excepting claims was to give notice of them, and respondent already had notice; petitioner protested repeatedly during the work that the contract price, and the time for completion were both inadequate (R. 30; Plf's. Exs. 105-D-E; 106-C-D-E-F-G-J-L-H; 104-M-R-U-W), no action on which protests had been taken but they were pending (R. 30).

(3) There is no proof that respondent lost any witness, or suffered otherwise through the delay in excepting until the suit was brought. So, no forfeiture was incurred (*American Ship Building & Dock Corp.* v. *John Rourke & Sons*, 4 F. (2d) 845, 846).

(4) The language of the contract is not plain that a forfeiture was intended, and it will not, therefore, be construed as providing for one (17 C. J. S. § 320, ps. 742, 743; *Texas Co.* v. *Pensacola Etc. Corp.*, 279 F. 19, 26, 27; 12 *Am. Jur.* § 307, p. 862; *General Contracting Co.* v. *Grignon*, 255 F. 952, 954).

V.

The court below erred in refusing to find, as requested by petitioner that as a result of delays caused by respondent, petitioner was unable to complete the work within the time fixed by the contract, and was necessarily engaged in completing it the extra time actually taken, as enumerated as to the buildings in No. 11 of the specification of errors, and that respondent illegally deducted $2,490. As liquidated damages, which petitioner duly protested (R. 18, 19, 28; Deft's Ex. AA).

(a) *Respondent caused the delays.*

From the start of the job, petitioner was given a work order to go ahead, and soon after a change order to stop, and, next, another change, which kept on many months, necessitating taking men off the work, demoralizing them and destroying their morale, and resulting in constant delays (Point I above), substituting for the contract specifications, (which it was agreed were to be strictly observed), experimental building from day to day (see Pts. I, II, and III above). Petitioner should not be mulcted with liquidated damages for these delays which respondent caused. (*Clark, Architect, Owner & Builder* 291; *Waste in Industry* 72; *U. S.* v. *Behan,* 110 U. S. 338; *U. S.* v. *Spearin,* 248 U. S. 132; *U. S.* v. *Barlow,* 184 U S. 123, 135, 137.)

(b) *A detailed examination of respondent's charges for delays shows that even in this respect they were improperly made.*

(1) The Court below does not find petitioner chargeable with any delays (R. 11-21), yet, incongruously, finds respondent entitled to liquidated damages (R. 22, 24). This conclusion has no basis in the findings of fact, and can not

be cured by the Opinion. (*U. S.* v. *Esnault-Pelterie*, 299 U. S. 201, 206).

(2) The Court below finds:

(a) That the putty was ready for inspection September 19, 1935, but was not released for shipment until October 2nd (R. 14), a delay of 12 days (Pt. III above); (b) that the contracting officer found that the lavatories were rejected July 19, 1935, and approved as first submitted, but not until September 30th (R. 20; Pt. III above), a delay of 65 days; (c) that the Government delayed from the latter part of October until the completion of the contract work (November 7, 1935) to furnish electricity for testing the pumps (R. 17; Pt. III above).

(3) Respondent concedes that it delayed as follows: 60 days by Change Order A; 5 days by Change Order B; 10 days for failure to inspect roofing material (R. 17, 18), making altogether 75 days.

(4) It appears that respondent caused the following delays, but instead of crediting, it charges petitioner therewith, viz, Ceiling, Helix House 33 days (Pt. II above); Screens 30 days (*Id.*); Road 30 days (*Id.*).

(5) As the court below did not find petitioner chargeable with delays, and as respondent was chargeable with delays, petitioner cannot be assessed with liquidated damages. (*Standard Steel Co.* v. *U. S.*, 67 Ct. Cls. 445; *Greenfield Tap & Die Corp.* v. *U. S.* 68 Ct. Cls. 61; *Christensen Constr. Co.* v. *U. S.*, 72 Ct. Cls. 500; *Bethlehem Steel Co.* v. *U. S.*, 75 Ct. Cls. 845; *Caldwell & Dranke* v. *Schmulbach*, 175 F. 429, 434; *Vilter Mfg. Co.* v. *Tygart's Valley Brewing Co.*, 168 F. 1002; *U. S.* v. *United Engineering Co.*, 234 U. S. 236).

(6) The parties did not, when respondent granted extensions, fix the damages for delays from then on, and it made

no proof that it suffered damages from such delays, and it cannot, therefore, recover damages therefor (*U. S.* v. *United Engineering Co.*, 234 U. S. 236, 242).

VI.

The court below erred, as shown under the points above, in making it conclusions of law "that plaintiff is not entitled to recover and its petition is therefore dismissed, judgment is rendered against the plaintiff for the cost of printing the record herein, the amount thereof to be entered by the clerk and collected by him according to law" (R. 22; S. E. III).

VII.

The Court of Claims erred in making the findings in its opinion set out in the petition in the specifications of errors (S. E. IV) for the reasons shown under the points above. "The special findings may not be aided by statements in the * * * opinion of the court * * *." (U. S. v. Esnault-Pelterie, 299 U. S. 201, 206).

The court below found that "There is no evidence of appeal to the Secretary of the Navy" (R. 21). Although the evidence shows that an appeal was taken to the contracting officer, a representative of the Secretary of the Navy (R. 19), petitioner was not obliged to appeal or submit his claim for damages to said Secretary (*Phoenix Bridge Co.* v. *U. S.*, 85 Ct. Cls. 603, 630; *Clyde* v. *U. S.* 13 Wall. 35, 39).

Conclusion.

Petitioner agreed only to construct these buildings "in strict accordance with the specifications," but respondent, violating this provision, to the benefit of which petitioner was entitled, made many major changes, so sweeping that by them alone the contract was abandoned (Special Finding,

10; R. 17, 18), and day to day changes besides, clearly proven, and not disputed, resulting in experimental building—building one day and tearing down the next, as proved also without dispute (all which the court refused to find), causing the delays in completion, and an added cost of $34,187.69 (Pts. I-II above).

Petitioner proved that the delay and cost increase resulted from these changes, but as the textbooks on construction all state that loss and delay inevitably result from such changes, and the court decisions hold likewise, it is thought that the court would take judicial notice that such consequences would necessarily result from such changes (*Id.*).

We doubt whether any other construction case will come before this Court with so many changes, or entailing such disastrous results, or where a petitioner will be more entitled to the benefit of the recent Act as to procedure in the Court of Claims cases; or where there are so many instances of (1) refusals to find material facts, based on undisputed evidence, and the conclusions resulting from such facts; or (2) lack of substantial evidence to sustain findings of fact made; or (3) ultimate findings not sustained by finding of primary facts; or (4) erroneous conclusions of law.

For the reasons stated, it is respectfully submitted that this petition for writ of certiorari should be granted.

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(1919)

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No. 673

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

H. B. NELSON CONSTRUCTION COMPANY,
PETITIONER

v.

THE UNITED STATES

REPLY BRIEF FOR PETITIONER.

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.
CHARLES W. WARDEN, WASHINGTON REPRESENTATIVE,
TOWER BUILDING

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IN THE

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OCTOBER TERM, 1940

No. 673.

H. B. NELSON CONSTRUCTION COMPANY, PETITIONER

v.

THE UNITED STATES

REPLY BRIEF FOR PETITIONER.

I.

This action is to recover the value of work started under a contract, to be performed "in strict accordance with the specifications" (R. 6), (1) which petitioner claims was abandoned through respondent's making, as is conceded, 64 major changes,—one every third day for most of the time, and every fourth day for the remainder (R. 17, 18), and many changes from day to day for the 400 days the work was being done (R. 29); and (2) because respondent compelled petitioner to construct the buildings in an experimental way,—ordering one thing today, and directing it torn down tomorrow. (Ptnr's. Orgnl. Brf. Nos. 3, 4, 5, ps. 29, 30, 31.) Petitioner protested repeatedly against respondent's changes, mistakes, and delays. (*Id.* Petition p. 9, Par. 3.)

Respondent makes two answers,—

First, that proof of the minor changes was made by the petitioner's testimony only, and that the Court was not bound to believe him (Rspdt's. Brf. p. 7); and, second, that there has been no decision by this Court that such changes,—major or minor,—justify a *quantum meruit* recovery *(Id.* p. 6), and that, although petitioner so testified without dispute, these many changes were not experimental, and an exercise of unwarrantable superintendence *(Id.* 7).

(1) Respondent has so acted as to certify that petitioner's testimony was true:—

(a) All respondent's employees knew the facts to which petitioner testified, and could have contradicted him if he had varied at all from the truth. Yet no one of them,—not even those testifying,—contradicted him. By failing to contradict petitioner, respondent vouched conclusively for his credibility and his testimony. Under such circumstances petitioner's testimony is binding and conclusive. (Chesapeake & O. R. Co. v. Martin, 283 U. S. ps. 209, 216, 219 incl.; 20 Am. Jur. § 1180, ps. 130 to 132 incl.; Hull v. Littaur, 162 N. Y. 569, 572, 573.)

United States v. Goltra, 85 L. Ed. 450, holds that the Court was not bound to give weight to the testimony of petitioner because it was highly speculative. It was not on the question involved here whether petitioner's testimony was conclusive in view of his interest.

(b) But petitioner does not stand alone in his testimony. All respondent's employees, through respond-

ent's failure to question them,—even those who were witnesses,—it is presumed would have testified just as petitioner did. (9 Cyc. of Ev. 967; 14 Cyc. of Ev. 175.)

(2) That such a multitude of changes,—both major and minor,—entitles petitioner to recover on a *quantum meruit* is held by the technical works on building, and by the Courts, because only in this way can justice be done.

This Court held that a direction to a railroad contractor to make a continuous embankment instead of borrow pits made a new contract. (Henderson Bridge Co. v. McGrath, 134 U. S. 260.)

> "Material quantities of work required by such alteration, that are substantially variant in character and cost from that contemplated by the parties when they made their agreement, constitute new and different work, not governed by the agreement, for which the contractors may recover its reasonable value." (Salt Lake City v. Smith, 104 Fed. 457, 466,—quoted and approved in Drainage Dist. No. 1 v. Rude, 21 F. (2d) 257, 261.)
>
> "Nor do these provisions" (of the contract) "deprive the plaintiff of his right to recover damages for a substantial breach of the contract, due to substantial change or modification of the general plans and specifications." (Bates & Rogers Const. Co. v. Board of Com'rs., 274 F. 659, 667.)
>
> "* * * changes not fairly within the contemplation of the parties at the time the contract was made—changes constituting a material departure from the original undertaking—do not come within its terms * * *." (Mass. Bonding & Ins. Co. v. John R. Thompson Co., 88 F. (2d) 825, 829.)

As there were radical changes in the construction, necessitating additional cost (R. 28-31), petitioner is entitled to recover therefor. (Sartoris v. Utah Construction Co. *et al.*, 21 F. (2d) ps. 1, 3.)

Plum Bayou Levee Dist. v. Roach, 174 F. 953 holds that changing line of levee from dry to swampy ground constituted a breach of contract.

The textbooks on building construction hold that to avoid delays and increased cost the work must be carefully planned, and the plan followed, and that where there are substantial changes

> "a reasonable valuation of the work done and materials delivered constitutes the only means by which the builder can be fairly compensated." (Clark,—Architect, Owner & Builder, p. 291; Emden's Building Contracts, etc., 4th Ed. Ch. 14, p. 190; Waste in Industry, p. 72.)

(3) Petitioner's testimony is undisputed that the buildings were built through experiments (R. 29; Ptnr's. Orgnl. Brf. par. 5, ps. 30, 31),—building and finding that what was built did not answer its needs, and tearing down and rebuilding, and, as respondent's employees knew the facts and they, (even those who testified), did not dispute this, it is presumed that, if questioned, they would have testified the same way. (9 Cyc. of Ev. 967; 14 Cyc. of Ev. 175.) This entitles petitioner to recover the value of the work. (U. S. v. Barlow, 184 U. S. 132, 138.)

II.

Respondent makes several answers to petitioner's contention that the release covered only what respond-

ent conceded to be due, and did not extend to the present claim for damages.

(1) Respondent urges, on the authority of Williston on Contracts, that, as the right to receive a release was reserved by the contract, the exacting it was not duress. Requiring a release is not the question involved, but its effect: Petitioner urges that it does not extend to the damages he seeks. Of course, respondent had the right under the contract to a release of what was due on the contract. It had no right to a release of the damages outside the contract, and compelling a general release alleged to cover the damages was duress.

(2) Next, respondent urges that the damages are included because they arise "by virtue of the contract."

(a) As appears herein above under (2) and (3) of Point I, the extra work and cost caused by the changes did not arise "by virtue of the contract," but because of respondent's many breaches of it, entitling petitioner to his damages.

> "But where" (as here) "there are two claims, dependent on different facts, one of which is undisputed and the other of which is disputed, the payment of the undisputed claim does not bar the right to sue for and recover on the disputed claim." (Keene v. Gauen, 22 F. (2d) 723, 724.)
>
> (See also Owensboro Ditcher & Grader Co. v. Markham, 32 F. (2d) 564, 565; Mattack Coal & Iron Corp. v. New York Quebracho Extract Co., 32 F. (2d) 275, 276; Pollocks Principles of Contracts, 9th Ed., 545; Chitty

on Contracts, 18th Ed. § 4, Ch. XXIII, p. 873; and the authorities cited under Point IV of Petitioner's original Brief pages 35 to 37 incl.)

III.

In answer to respondent's notes pages 7 and 8,—as to the road roller,—the fact that the roller was somewhat smaller than the specifications prescribed is unimportant: The Trial Court found that the roller was so heavy that the road curled up in front of it, and forced the rock into the ground (Finding 8, R. 16), so that the road had to be refinished at an extra cost of $5500 for rock and roller rent. The evidence that the roller was not too heavy for other roads constructed with the same specifications was incompetent in the Federal Courts, because this would involve the collateral issue as to similarity. (Union Pacific R. Co. v. Callaghan, 161 U. S. 461.)

And it is incompetent even in the State Courts because there was no evidence of similarity of the roads, but only of the specifications: The foundations of the other roads may have been rock, and that of this road was mud. (Bach v. Iowa R. Co., 112 Iowa , 83 N. W. 959; Campbell v. Russell, 139 Mass. 278, 1 N. E. 345.)

Windows and Screens.

This is fully covered in Petitioner's original brief in (b) Point II, page 33.

Ceiling.

This is also fully covered in petitioner's original brief under (c) of Point II, page 34, except that re-

spondent claims that the sweating process was successfully used elsewhere. This evidence is incompetent for the reasons shown above as to its being introduced regarding the roller.

Conclusion.

Respondent urges that certiorari should be denied because there is no conflict of decisions, and no question of importance is involved.

The decision here is in conflict with,—

(1) All of the authorities cited under Point I on petitioner's right to recover damages because of the multitude of both major and minor changes made by respondent;

(2) With U. S. v. Barlow, 184 U. S. 123, 135 to 138 incl., as to petitioner's right to recover because respondent forced him to build in an experimental way;

(3) With the authorities cited by petitioner under Point I of this and Point IV of his original brief, showing that petitioner is not bound in this action for damages by the release given on payment of what respondent conceded was due under the contract;

(4) With the authorities cited in this brief under Point III and in his original brief under Point II, as petitioner's right to recover for extra work and expense as to the roller, the window screens, and the ceiling;

(5) With the authorities cited by petitioner on delays under Point V of his original brief;

(6) With petitioner's right to controlling Findings, (1) that there were many day to day changes the 400 days the work continued; (2) that the multitude of changes entitled petitioner to recover the reasonable value of his work; (3) that respondent compelled petitioner to build in an experimental way; (4) that petitioner is entitled to recover because of this; (5) that respondent breached its warranty that the roller it compelled petitioner to use was suitable for the work, entitling petitioner to recover his loss; (6) that the window screens were inspected and approved; and that this was binding because the alleged defect was visible, entitling petitioner to recover for the extra work respondent required him to do; (7) that respondent required petitioner to experiment in putting up the ceiling, entitling him to recover.

It is respectfully urged that certiorari be granted.

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No. 673.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

H. B. NELSON CONSTRUCTION COMPANY,
PETITIONER,

v.

THE UNITED STATES.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

PETITION FOR REHEARING.

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Dated: March , 1941.

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

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Supreme Court of the United States

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vs.

THE UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

PETITION FOR REHEARING.

Comes now the above named petitioner, Nelson Construction Company, and presents this its petition for a rehearing on its application for a writ of certiorari to review the judgment of the Court of Claims in the above entitled cause. Petitioner's application for such writ was denied by this Court on March 3, 1941.

Ground for Rehearing.

This petition for a rehearing is filed under Rule 33 of this Court.

The primary ground for this petition is the departure by the Court of Claims from the accepted and usual course of judicial proceedings within the meaning of Rules 41 and 38, subdivision 5, of this Court, in failing to make findings of fact on the material issues

which, uncorrected, would deny a judgment required by uncontradicted and sufficient evidence, in conflict with the decisions of the Court of Claims, of this Court, and of the various Federal Circuit Courts of Appeal, evidenced by the facts that:

1. The Court of Claims based its decision entirely upon the erroneous theory that petitioner's claim for damages for radical, revolutionary changes, and experimental work required by the Government which are outside the contract, is controlled by the provisions of the contract. (R. 17, 18, 23, 24.)

2. Because of its reliance upon such provisions, the Court of Claims did not concern itself with what are conceded by respondent's counsel in his brief to be the undisputed facts of the case as set out in the Petition and Brief, pages 2-10, material to the problem involved.

3. The Court of Claims failed to make special findings of fact, undisputed facts, requested by petitioner, which it was required to make under Rule 41 and the decisions of this Court. (Spec. of Errors, ps. 10-16.)

4. The result reached by the Court of Claims cannot be reconciled with or sustained by the admitted facts which clearly entitle petitioner to the recovery asked for under the decisions of this Court, the Court of Claims and the Circuit Courts of the United States. (Petitioner's Brief, ps. 31-26.)

I.

The Court of Claims did not complete the trial of this case, but left it wholly undetermined. It did not make findings on either one of the two material issues described under (a) and (b) hereinbelow.

(a) The Court below refused to find the following undisputed facts,—

(1) That there were 65 major changes (R. 28, 29), —one every third day for most of the 400 days the work was in progress (R. 28), and every fourth day for the remainder; (R. 28, 29), Change Orders A and B being a summary of these changes (R. 28, 29, 17, 18);

(2) That minor changes were made from day to day the 400 days the work was in progress, (not included in the Change Orders; (*Id.*);

(3) That these minor and major changes created an unsettled condition, broke the morale of petitioner's force, and at times prevented the working of the full force of several hundred men, (R. 28, 19);

(4) That petitioner expended in doing the work $322,030.40 (R. 28);

(5) That the increase in cost over the contract price of $275,889.00 was $34,187.69, which, with a 10% profit amounting to $32,203.04, and ½% for the bond, amounting to $5,313.50, makes a total of $71,-704.19 (*Id.*);

(6) That no proof was offered that any of the expenditure was extravagant or unnecessary; and

(7) That,—(because of these undisputed circumstantial facts petitioner is entitled, under this Court's Rule 41, to a finding of the ultimate fact),—there were material quantities of work resulting from the multitude of alterations, substantially variant in character and cost from that contemplated by the parties when they made their agreement, which constituted new and different work which petitioner was required to do and did (R. 28-31);

(8) It was material that the Court below make the above described findings, as through them petitioner becomes entitled to recover $71,704.19, the extra cost and a profit. (See authorities pages 3 and 4 of Reply Brief.)

(b) The Court below refused to find the following undisputed facts,—

(1) That respondent required petitioner to tear out parts of the buildings, change the locations, and take the men off the work; that respondent found repeatedly that the work ordered did not meet its needs, and so petitioner was given orders to go ahead, and in a few days an order to stop, and in a few days more another change, which kept on repeating itself many months; that the costs were increased by this unsettled condition; that it was almost impossible to keep materials and men coordinated, and it broke the morale of petitioner's force (R. 28, 29); and

(2) That, (as a result of these undisputed circumstantial facts petitioner is entitled to a finding of the ultimate fact), respondent required petitioner to construct the buildings in an experimental way,—having something constructed today, and tomorrow finding that it did not answer its needs, and requiring petitioner to tear it down, and construct something else (R. 29).

(3) The two findings of fact last above described constitute not alone a material but a controlling issue, as they show the exercise of unwarrantable superintendence, and an improper interference with the work, entitling petitioner to recover the loss he sustained, stated under Sub-division (5) of (a) of I hereinabove. (U. S. v. Barlow, 184 U. S. 123, 135-138.)

(c) The Court below refused to find the following facts,—

(1) The Court found that respondent required petitioner to use so heavy a roller on a road completed according to specifications, except for rolling, that it tore up the road and required refinishing; (at an extra cost of $5500., taking 30 days extra time); (R. 27; Petition and Brief, ps. 7, 8, 33), but

The Court refused to find the ultimate fact, (necescarily resulting from what it did find), that the roller was too heavy.

(2) This refusal was material because requiring the use of too heavy a roller was a breach of respondent's implied warranty that the roller would not be too heavy. (U. S. v. Spearin, 248 U. S. 132.)

(d) The Court below refused to find the following undisputed facts,—

(1) That the contract provided for inspection and approval of finished products, and that such approval would be binding except as to latent defects, (Plf's. Ex. 101, Contract p. 4).

(2) That certain windows and screens were so inspected and approved. (R. 13.)

(3) That an alleged defect of 3/8 of an inch space between the screens and contact rolls was a visible defect. (R. 36.)

(4) That respondent required petitioner to do extra work in remedying this alleged defect at a cost of $1700., and which took 30 days time. (R. 25, 26; Petition & Brief ps. 6, 33, 34.)

(5) That these refusals were material because doing this extra work to correct a visible defect entitled petitioner to recover its value. (Henderson Bridge Co. v. McGrath, 134 U. S. 260).

(e) That the Court below refused to find the following undisputed facts,—

(1) That respondent required petitioner to make five (5) attempts to put up a ceiling by the soldering process, (instead of by bolts as the contract provided), which proved to be a failure, which cost $1920., and delayed petitioner 33 days.

(2) That petitioner made earnest but futile efforts to use this process.

(3) That respondent abandoned the process as impossible, but not until it had required petitioner to make the five unsuccessful attempts. (Petition & Brief, ps. 6, 7, 34.)

(4) That this refusal is material because the attempts which respondent required petitioner to make were experimental and a failure, entitling petitioner to recover the extra cost. (U. S. v. Barlow, *supra.*)

II.

Respondent's answer (Brf. P. 7) to petitioner's claim as to the 65 major and the many day to day minor changes, and the resulting extra work and increased cost is that they depend upon the testimony of petitioner only, whom the Court was not obliged to believe. Such is not the rule applicable in this case:

(a) "A jury is generally authorized to accept the uncorroborated testimony of a party upon a matter regarding which there is no other evidence." (9 Cyc. of Ev. 515.)

(b) " 'The mere fact that the plaintiff, who testified to important particulars, was interested, was unimportant in view of the fact that there was no conflict in the evidence, or anything or circumstance from which an inference against the fact testified to by him could be drawn.' " (Chesapeake & O. R. Co. v. Martin, 283 U. S. 209, 218, 219.)

(c) Respondent's failure to contradict petitioner, and even to question on the issues involved its officer in charge, and its engineer who were in Court and examined

> "* * * is itself persuasive that their testimony, if given, would have been unfavorable to appellants" (here respondent). "* * *. Silence then becomes evidence of the most convincing character." (Interstate Circuit v. U. S., 306 U. S. 208, 226.)
>
> (d) "* * * and that suspicion should not outweigh uncontradicted evidence is quite strikingly shown in a recent decision * * * in Miller v. Herzfeld * * *, 4 F. (2d) 355, a case under this statute where improbability and suspicion might well have been given greater weight than in the present case." (Becker v. Miller, 7 F. (2d) 293, 295.)

(e) Petitioner was financially ruined through this and a companion case, and it was difficult for him to present his case, and impossible to produce additional witnesses, while the Government, with no financial problem, failed to call its inspector, its best witness, and did not even question the witnesses it swore on the material questions involved.

III.

Petitioner is entitled, as counsel believes, of right, to the material and controlling findings described under I hereinabove, under the decisions of this Court, a recent act of Congress, and the fifth amendment to the Constitution.

(a) Petitioner, as appears above, proved without dispute that he was entitled to recover on the only

two issues involved,—that there were a multitude of changes entailing work outside the contract, and that the buildings were constructed in an experimental way, (the issues as to the roller, the windows and screens, and the ceiling being part of these two main issues), but with these two, the only issues, uncontested and clearly established in his favor, the trial ended in an incomplete state,—no findings being made on either issue.

(b) This Court has uniformly held that a party is entitled to have findings made on all material issues, and has so held very recently in U. S. v. Esnault-Pelterie, 299 U. S. 201, 205. Such has been the ruling of this Court from the earliest days. (Mahan v. U. S., 14 Wall. 109-112.)

(c) This Court, in U. S. v. Esnault-Pelterie, 303 U. S. 26, 32, held that it could not review the facts because the Record did not contain the evidence due to

> "* * * the procedure * * * established by the Congress for the determination of claims against the United States,"

whereupon Congress passed the Act of May 22, 1939, §288, Title 28 USCA, providing that,—

> "* * * the Supreme Court shall have authority to review" (when the evidence has been certified to it), "in addition to other questions of law, errors assigned to the effect that * * * there is a failure to make any finding of fact on the material issues."

Congress thereby agreed with the rule established by this Court that the right to the completion of a trial should remain sacred and inviolate.

This is true generally. How much more so here with undisputed evidence, yet no findings!

(d) Because both of the multitude of changes respondent required, and of its requiring petitioner to construct the buildings experimentally, petitioner became entitled to the extra cost, plus a profit, which is property, of which he will be deprived without due process of law, unless findings on these two issues are made, and, so, a question is involved under the Fifth Amendment to the Constitution. (Fayerweather v. Ritch, 195 U. S. 276.)

(e) With more changes here than in any reported case, and with the buildings indisputably built experimentally, there is no possible defense to petitioner's recovery of the value of his work. Respondent sets up a release, but that it does not affect the claim now urged is fully shown at pages 15 and 16, and 35 to 37 incl., in petitioner's original brief and pages 4 to 6 of his reply brief; and besides, this Court holds that where, as here, respondent has been arbitrary and ignored petitioner's many protests, the latter is not bound by the failure to except damages from a release given. (U. S. v. Smith, 256 U. S. 11, 16.)

Moreover, petitioner's claim to payment for the amount retained for liquidated damages was expressly excepted. So, as to it, the right to Certiorari cannot, on any sound ground, be contested. (See Petitioner's Brief, ps. 38, 39.)

(f) This failure to make findings on all the issues is the ground of the appeal to this Court, and because

counsel feels that they may not have made this entirely clear, this petition for a rehearing is made.

IV.

(a) While petitioner did not urge it in his petition or briefs, and indeed it did not occur to him, is there not a grave public question in this case?

This Country is engaged in a herculean effort to prepare to defend itself against Foreign aggression. This necessitates efficiency and haste. It is in the hands of contractors, manufacturers and builders. Success depends on them.

It is of vital importance to them to know that the Government can not make many substantial changes or build experimentally without becoming liable for the increase in cost, and the Nation is interested to have the best efforts of the contractors undisturbed by worry whether they will be able to collect the amounts justly due them.

(b) The right to a completed trial is fundamental and basic one. The case at bar involves, as pointed out in the two preceding briefs, a conflict with all of the preceding cases on the issues involved. It is urged that a grave question, of vital importance to the Nation, is also at stake; and that to sustain the judgment below without findings of fact on the material issues, would deprive petitioner of his property without due process of law. (Fayerweather v. Ritch, *supra.*)

For all the foregoing reasons, including those set forth in the Petition, Brief and Reply Brief, petitioner urges that this petition for a rehearing and the writ of certiorari be granted.

Respectfully submitted.

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BRUCE FULLER,
Attorneys for Petitioner,
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Washington, D. C.

Dated: March 19, 1940.

Certificate of Counsel.

I, S. Wallace Dempsey, one of counsel for the above named petitioner, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

S. WALLACE DEMPSEY,
Counsel for Petitioner.

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293970—41

In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 673

H. B. NELSON CONSTRUCTION COMPANY, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (R. 22–24) is not yet officially reported.

JURISDICTION

The judgment of the Court of Claims was entered on June 3, 1940 (R. 24). A motion for a new trial (R. 24) was overruled on October 7, 1940 (R. 25). The petition for a writ of certiorari was filed January 4, 1941. The jurisdiction of this Court is invoked under the provisions of Section 3 (b) of the Act of February 13, 1925, as amended

by the Act of May 22, 1939, c. 140, 53 Stat. 752 (U. S. C., Supp. V, Title 28, Section 288).

QUESTIONS PRESENTED

1. Whether the facts as found by the Court of Claims are supported by substantial evidence.

2. Whether the Court of Claims erred in failing to find the facts as requested by petitioner.

3. Whether a release signed by petitioner bars recovery on any claim not expressly excepted from the release.

4. Whether liquidated damages were properly assessed against petitioner.[1]

STATEMENT

On September 12, 1934, petitioner entered into a contract with the United States whereby, for a consideration of $275,889.00, he agreed to furnish all the labor and materials and perform all the work required for the construction of certain buildings and plants [2] at the Naval Radio Station, Summit, Canal Zone, in accordance with certain drawings and specifications (R. 11–12). The work was

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[1] In this case, as in No. 672, filed by the same petitioner, the specifications of error to be urged (Pet. 10–19) are voluminous and confusing. See footnote 2, p. 8, Brief in Opposition in No. 672.

[2] Petitioner was to construct an intermediate and high frequency transmitter building, a low frequency transmitter building, a barracks, a helix house, a pump house, a water tower, two cooling ponds, a settling tank, certain roads and walks, and water, sewerage, drainage, and electrical systems (R. 11–12).

to be commenced within 10 calendar days after receipt of notice to proceed; the buildings and services were to be completed within 300 calendar days and the remainder of the work within 330 calendar days from the date of receipt of such notice (R. 12). Notice to proceed was received on September 26, 1934, thus fixing the completion date for the buildings and services as July 23, 1935, and of the remaining work as August 22, 1935 (R. 12). During the course of the construction certain changes were made as provided for in the contract. Change orders were issued; the contract price was increased; and the time for completion was extended (R. 17, 18), petitioner being a member of a Board appointed to consider the changes, the additional compensation, and the time extensions (R. 22, 29–30, 35). The contract was finally completed on December 2, 1935 (R. 18), and liquidated damages for delay in the amount of $2,490.00 were deducted from the final payment to petitioner (R. 19) in accordance with the terms of the contract (R. 12). Upon the completion and acceptance of the work and payment therefor by the Government, petitioner, on December 12, 1935, executed a release relieving the Government "from all claims arising under or by virtue of said contract", but reserved the right to protest the accessment of liquidated damages (R. 18–19).[3]

[3] On or about September 29, 1936, petitioner was allowed and paid through a settlement stated by the General Ac-

Petitioner, on June 8, 1937, brought this action in the Court of Claims to recover from the Government the difference between the sum the Government had paid pursuant to the contract and the alleged total cost to petitioner, plus 10% profit and 1½% for a bond (R. 10). The petition (R. 6–11),[4] after asserting various delays by the Government in inspecting materials and certain allegedly unreasonable demands by the Government, alleged that as a result of those delays and demands petitioner was unable to complete the work within the specified time, that the work cost $83,657.90 in addition to the contract price (R. 9), and that the deduction of liquidated damages for delay was illegal.

The Court of Claims made findings of fact (R. 11–21) and conclusions of law (R. 22) and rendered an opinion (R. 22–24). The court found that there was no delay on the part of the Government in the inspection of any of the materials and that none of the changes and requirements by the Government was unreasonable or abritrary. It accordingly held (R. 22) that petitioner was not entitled to recover and that the complaint should be dismissed. In its opinion the court pointed out

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counting Office the sum of $720.00, purporting to adjust the deduction for liquidated damages (R. 19).

[4] The complete petition (R. 1–11) alleged two separate causes of action. Only the second cause of action (R. 6–11) is here involved, the first (R. 1–6) being the subject matter of a separate suit, No. 672, this Term.

that "all these changes which were made were provided for in the contract, and that plaintiff accepted the Change Orders, performed the work, received the compensation as fixed in the Change Orders and that the time for completion of the contract was extended by the allowance of additional days. In addition to this, plaintiff's release to defendant of all claims is a complete defense to any action for recovery under the contract except as to the items which had been specifically excepted in the release" (R. 23).[5] Judgment was entered dismissing the complaint (R. 24). A motion for a new trial (R. 24) was overruled (R. 25).

ARGUMENT

Petitioner contends that the Court of Claims erred in failing to find that there were so many changes and delays caused by the Government, in addition to those in the Change Orders, as to amount to an abandonment of the contract by the Government, thereby entitling respondent to a *quantum meruit* recovery (Pet. 27–33, 33–34, 35), that the release was not binding (Pet. 35–37) and that liquidated damages for delay were illegally deducted by the Government (Pet. 38–40). The court below found against petitioner on each issue, and the case presents no question which would warrant review by this Court.

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[5] The court also held, in accordance with its findings, that the specific delays for which liquidated damages were assessed were not caused by respondent (R. 24).

1. (a) The record in no way suggests an abandonment of the original contract by the Government. On the contrary, it is clear, as the court below held, that all actions of the parties were in strict compliance with the terms of the contract (R. 23). Change Orders (R. 17–18), as provided for in the contract, were issued. Petitioner was a member of the Board which issued the Change Orders (R. 22, 29–30, 35) and signed the reports agreeing to the changes as to contract price and completion date (*ibid.*). Moreover, on receipt of payment in full, petitioner, pursuant to the contract, signed the release mentioned above (R. 18–19, 30). At no time during any of the negotiations did petitioner suggest that the contract was or should be changed to a cost-plus contract. There is nothing in the decisions of this Court which support the suggestion that a "multitude" of changes in accordance with the procedure established by contract entitles the contractor to sue on a quantum meruit basis. *United States* v. *Spearin,* 248 U. S. 132, relied on by petitioner, is not in point. There the Government illegally annulled a contract, and the Court allowed as damages the difference between expenditures and receipts, plus the certain profit which would have been earned if there had been no annulment. See also *United States* v. *Behan,* 110 U. S. 338. In *United States* v. *Barlow,* 184 U. S. 123, the extra work was concededly experimental, and the Gov-

ernment officers, while acknowledging that some compensation should be given, concluded that the work was not within the coverage of the change order provision.

(b) Moreover, there is no substantial evidence to support petitioner's contention that there were so many changes, in addition to those in the Change Orders, as to amount to an abandonment of the original contract. The only evidence on this point is petitioner's statement that there were many changes (R. 28–29). The Court of Claims did not have to give weight to that testimony. Cf. *United States* v. *Goltra,* Nos. 191, 192, this Term, decided February 3, 1941. On the other hand, the Court of Claims found that the Government caused no delay and did not require petitioner to do more than his contract required. These findings are all supported by substantial evidence.[6]

[6] Road roller (Fdg. 8, R. 16): The evidence showed that a smaller roller than that set forth in the specifications was used, that other roads had been built under the same specifications, and that the roller was not too heavy (R. 39–40).

Windows and Screens (Fdg. 3, R. 12–13): The specifications provided that the screens should fit the windows for which they are used (R. 37). The evidence shows that after their arrival, the screens did not fit, and that all the Government required was that they be made to fit (R. 36–38).

Ceiling (Fdg. 7, R. 15–16): The evidence shows that the copper ceiling was put in by bolts, that petitioner had unsuccessfully tried the more expensive "sweating" process, that although bolts were finally used, petitioner was paid on the basis of the "sweating" process (R. 32–35). More-

2. Petitioner's contention that liquidated damages for delay were illegally deducted is without substance. The court below, as we have shown *supra,* properly found that the Government did not cause any delays. The contracting officer found that the delays by petitioner were not excusable and his determination was incorporated in the court's findings (R. 19–21). There being no showing that the action of the contracting officer was arbitrary or capricious, his determination is conclusive. See Brief in Opposition in No. 672, this Term.

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over, it appeared that the "sweating" process was successfully used elsewhere (R. 35).

Lavatories (Fdg. 5, R. 14–15): The evidence shows there was no delay in inspection (R. 20–21). Moreover, it appears that the time of receipt of the lavatories on the job in no way affected the completion date of the buildings in which they were installed (R. 32).

Putty and Glass (Fdg. 4, R. 13–14): The evidence shows that the Government inspector requested the manufacturer to submit a detailed list of glass and putty, which was done on September 19, 1935, that the glass was inspected and released on September 23, 1935, that a sample of the putty was taken for analysis on September 23, 1935, and released for shipment on October 2, 1935, and that this was a reasonably short time (R. 31–32).

Pumps (Fdg. 9, R. 16–17): The evidence shows that petitioner applied for pump tests on October 21, 1935, and that they were tested on November 1, 1935 (R. 28). There is no evidence of damages to petitioner, or any proof that a pump man would not have been required even if the pumps had been tested.

Plumbing supplies: The record discloses that the receipt of the plumbing supplies in no way affected the completion date of the buildings (R. 32).

3. Petitioner's contention that the release was not binding since it was signed when petitioner needed money to meet his pay roll is clearly without merit. Assuming that the Government insisted on the release as a condition of payment in accordance with the right expressly reserved in the contract, such exercise of a contract right does not constitute duress. Williston on Contracts (Rev. ed. 1937), Sec. 1606. See Brief in Opposition in No. 672, this Term. Petitioner's contention that the release should not be construed to include claims for damages is in the teeth of the express language of the contract. Even if the claim for a quantum meruit recovery is not one "under the contract," it is certainly one arising "by virtue of the contract." *Piatt's Administrator* v. *United States,* 89 U. S. 496, is not in point. There it was merely held that a private Act directed the accounting officers of the Government to "settle" with a contractor, the settlement not to exceed the amount claimed by the Government on a counterclaim, did not contemplate a payment in full, and did not prevent recovery of any further balance due. See also *Fire Insurance Association* v. *Wickham,* 141 U. S. 564. Here, the release provision (R. 18) is clear, specifically barring all claims, save such items as are specifically excepted.

CONCLUSION

There is no conflict of decisions, and no question of importance is involved. We respectfully submit, therefore, that the petition for a writ of certiorari should be denied.

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